

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: AQUILA, INC., d/b/a AQUILA NETWORKS	DOCKET NO. SPU-03-7
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ORDER DENYING MOTION TO REOPEN RECORD

(Issued September 12, 2003)

On August 29, 2003, Aquila, Inc., d/b/a Aquila Networks (Aquila), filed with the Utilities Board (Board) a motion to reopen the evidentiary record in this matter for the admission of a late-filed exhibit. Aquila asks the Board to reopen the record to receive late-filed Exhibit 128, which is a copy of an editorial from the latest issue of Public Utilities Fortnightly, dated September 1, 2003. Aquila asserts that the editorial, "Aquila: Better Off Dead," is authored by Richard Stavros, the same person who authored an editorial entered into evidence by the Consumer Advocate Division of the Department of Justice (Consumer Advocate) as Exhibit 202 at the hearing on August 26, 2003. The September 1 editorial discusses this docket and Aquila asserts the editorial provides a position contrary to the position of Consumer Advocate witness Gregory Vitale that bankruptcy is a "preferred strategy."

Aquila states that the September 1 editorial was not in existence prior to the hearing and so could not have been offered at the hearing and could not have been used for cross-examination. Aquila states that the September 1 editorial makes it clear that bankruptcy is not a preferred strategy and that the earlier editorial, Exhibit 202, also did not indicate that bankruptcy was a preferred strategy. Aquila asserts that the editorial provides probative evidence relevant to a material issue in this case.

On September 3, 2003, Consumer Advocate filed in opposition to the motion to reopen the record. Consumer Advocate argues that the editorial is tangential to the issues in this docket and admitting the late-filed exhibit would not allow Consumer Advocate sufficient opportunity to review and file a response to the editorial. Consumer Advocate states that it offered the earlier editorial to demonstrate the views existing within the utility industry in general and, by contrast, Exhibit 128 focuses on Aquila specifically. Consumer Advocate argues that reopening the record undermines the orderly presentation of evidence and does not allow time to respond appropriately. Consumer Advocate indicates that additional testimony might also be necessary to address the September 1 editorial.

Subrule 199 IAC 7.7(15) provides that Board may reopen the record for the reception of additional evidence and the motion to reopen shall comply with subrule 199 IAC 2.2(12). Subrule 2.2(12) states that the pleading shall contain a clear and concise statement of the facts claimed to constitute grounds requiring reopening the record, "including the material changes of fact or law alleged to have occurred since the conclusion of the hearing."

The Board as the fact finder is granted a broad range of discretion concerning the admissibility of evidence. Bangs v. Maple Hills Ltd., 585 N.W.2d 262, 265 (Iowa 1998), citing Bingham v. Marshall & Huschart Machinery, 485 N.W.2d 78, 80 (Iowa 1992). The Board considers the reopening of the record after the hearing to be an unusual event that should only be granted when the circumstances warrant the presentation of additional evidence to ensure the record is complete and accurate.

In this instance, the Board finds that the evidence offered by Aquila is merely cumulative and is not of sufficient probative value to justify reopening. Although the

September 1 editorial may have been admissible at the hearing if it had been available, it does not represent a material change in the facts presented and is only cumulative to evidence already presented.

In addition, if the Board reopened the record for the admission of the September 1 editorial, it would have to allow an opportunity for responsive evidence from Consumer Advocate and, potentially, conduct a hearing for cross-examination. This might delay the completion of the record such that the Board would not be able to render a decision within the statutory deadline. The probative value of the information in the September 1 editorial is not of such significance as to warrant additional procedures. For these reasons, the Board will deny the motion to admit late-filed Exhibit 128.

IT IS THEREFORE ORDERED:

The "Motion to Reopen Record" filed by Aquila, Inc., d/b/a Aquila Networks, on August 29, 2003, is denied.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 12th day of September, 2003.